

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHARLES P. FRICK,) CASE NO. C06-0104-JLR
Plaintiff,)
v.) REPORT AND RECOMMENDATION
DAREN SWENSON,)
Defendant.)

INTRODUCTION

Petitioner has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Respondent has filed an answer, raising the statute of limitations as a bar to the court's consideration of petitioner's petition. Petitioner has not filed a response to respondent's answer. Because respondent is correct in his argument, petitioner's petition should be dismissed as untimely pursuant to 28 U.S.C. § 2244(d).

PROCEDURAL HISTORY

Petitioner pled guilty in 1983 to several counts of rape and was sentenced, under the indeterminate sentencing scheme then in effect, to a potential maximum term of life imprisonment.

(Doc. #11, Ex. 1). Petitioner's sentence was originally suspended but, after violating terms of his probation, petitioner was sentenced in 1984 to prison for a period of life with possibility of parole. (*Id.*, Ex. 2). Petitioner did not file a direct appeal.

In 1994, petitioner had his first hearing to determine whether he was suitable for parole. (*Id.*, Ex. 7). He was denied parole primarily because he had refused to participate in programs designed to treat sexual deviancy. (*Id.*) In 1997, after another parole hearing, he was again denied parole for similar reasons. (Doc. #11, Ex. 8). Petitioner's minimum sentence was increased by 120 months. (*Id.*) Most recently, in 2005, petitioner was found again not to be parolable and his sentence was increased by 60 months. (*Id.*, Ex. 9).

In December, 2004, petitioner filed a post-conviction challenge to his sentence ("personal restraint petition or PRP") in Washington state court. (*Id.*, Ex. 10). The Washington Court of Appeals denied the petition. (*Id.*, Ex. 13). Petitioner then sought review by the Washington Supreme Court and the court denied review. (*Id.*, Ex. 17).

On January 27, 2006, petitioner filed the instant petition under 28 U.S.C. § 2254. (Doc. #4). On March 16, 2006, respondent filed his answer to the petition, along with the state court record. (Doc. #9, #11). Petitioner has not filed a response, and the matter is now ready for review.

DISCUSSION

In his § 2254 motion, petitioner raises two grounds for relief. First, petitioner contends that he "is being unlawfully restrained in excess of the sentence imposed by the trial court . . ." (Doc. #4 at 2). Second, petitioner contends that the State breached his plea agreement. (*Id.* at 3). However, the court need not address the merits of these claims because petitioner's habeas

01 petition is barred by the federal statute of limitations.

02 Petitions filed pursuant to 28 U.S.C. § 2254 are governed by the one-year statute of
03 limitations provided in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).
04 *See* 28 U.S.C § 2244(d). When, as here, a conviction becomes final before the effective date of
05 AEDPA, which was April 24, 1996, the petitioner has until one year after that date, or until April
06 23, 1997, to file a federal habeas petition. *See Miles v. Prunty* , 187 F.3d 1104, 1105 (9th Cir.
07 1999).

08 Petitioner did not file the instant petition until 2006, well beyond the 1997 deadline
09 imposed by AEDPA. Although under AEDPA a properly filed petition for postconviction relief
10 tolls the statute of limitations, here, petitioner did not seek such relief until 2004, when he filed
11 his PRP in state court. (Doc. #11, Ex. 10). By that time, the deadline for filing a federal petition
12 had already passed.

13 Petitioner did not file a response to respondent’s answer and thus does not offer any
14 counterargument that his petition here is timely. However, in his answer, respondent attributes
15 to petitioner a counterargument that the petition is timely under 28 U.S.C. § 2244(d)(1)(D).
16 (Doc. #9 at 11). According to this counterargument, the petition is timely because the “factual
17 predicate” of the claim is that petitioner’s sentence exceeded what he considers to be the maximum
18 term, 20 years imprisonment, and this factual predicate did not become apparent until petitioner
19 had *actually* served the 20 years, which occurred in October 2002. (*Id.*) Therefore, under this
20 theory, the statute of limitations did not begin to run until October 2002.

21 Petitioner’s counterargument is unavailing for several reasons. First, the court notes that
22 petitioner did not raise this argument here. The document cited by respondent as the source for

01 this counterargument is petitioner's reply to the parole board's response to his PRP in state court.
02 (Doc. #11, Ex. 12). In addition, petitioner's reply does not appear to even make the argument
03 described by respondent. (*Id.* at 3). Second, even if petitioner did argue that his petition was
04 timely on this basis, the argument would fail because it is clear from the record that (a) the factual
05 predicate of the claim was apparent when the parole board extended petitioner's sentence beyond
06 20 years in 1997 (Doc. #11, Ex. 8); and (b) even if the statute of limitations did not start to run
07 until October 2002, the one-year period would have expired in October 2003, more than two years
08 before petitioner filed the instant habeas petition. Thus, even under the scenario purportedly
09 depicted by petitioner, the petition would still be time-barred.¹

10 CONCLUSION

11 For the foregoing reasons, petitioner's petition under 28 U.S.C. § 2254 is barred by the
12 applicable statute of limitations and should be dismissed. A proposed Order is attached.

13 DATED this 28th day of April, 2006.

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16 Mary Alice Theiler
17 United States Magistrate Judge
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21 ¹ Respondent argues that in addition to the statute of limitations bar, the petition is also
22 barred by procedural default because petitioner failed to exhaust his claims in state court. (Doc.
#9 at 11). However, the court need not address this alternative argument in light of the conclusion
reached above regarding the timeliness of the petition.